

- (1) Claimant made a claim for temporary total disability benefits at a preliminary hearing that was held before Special Administrative Law Judge William F. Morrissey on January 11, 1996. Claimant alleged that he injured his low back on May 26, 1995 when he picked up a tarp from underneath a table and felt pain as he turned to walk from the table. Claimant first obtained medical treatment for his low back pain from Dr. Simpson, a

chiropractor in Sabetha, Kansas, on May 31, 1995. After seeing the claimant on four occasions, Dr. Simpson referred claimant to Dr. Gregg Wenger, M.D., a family physician in Sabetha, Kansas, for further treatment. Dr. Wenger ordered a CT scan which indicated a herniated disc at the L4-5 level with protrusion to the left side. After finding the herniated disc, Dr. Wenger referred the claimant for further evaluation and treatment to K.N. Arjunan, M.D., a neurosurgeon in Topeka, Kansas. Dr. Arjunan ordered an MRI which showed a large herniated disc at L3-4 and a bulging disc at L4-5. Dr. Arjunan performed a left hemilaminectomy at the L3-4 level and discectomy on August 17, 1995. All medical treatment up to the date of preliminary hearing was paid either by the claimant or claimant's private health insurance carrier, Blue Cross/Blue Shield. Claimant testified that he was asked by the health care providers if he had medical insurance and he simply gave the health care providers his Blue Cross/Blue Shield card.

The Special Administrative Law Judge, in his Order, granted claimant's request for temporary total benefits for six weeks commencing August 17, 1995. Respondent argues that claimant failed to prove that he sustained a work-related accidental injury because Dr. Simpson, the chiropractor who first treated the claimant, in his treatment note of May 31, 1995 related a history of claimant being injured on May 27, 1995 instead of May 26, 1995. Additionally, respondent argues that Dr. Simpson's treatment notes on the three other occasions when he saw claimant did not indicate that claimant's injury was work related. Thus, the respondent concludes that the claimant has not met his burden of proving that his low back injury was related to his employment with the respondent.

The Appeals Board disagrees with the respondent and affirms the Special Administrative Law Judge's finding that claimant's accidental injury did arise out of and in the course of his employment with the respondent. The Appeals Board finds that the claimant presented evidence through his testimony that it is more probably true than not that his back injury is work related. Also, the medical records from both Dr. Wenger and Dr. Arjunan contain a history that was obtained from the claimant that is consistent with his description of his work-related injury.

(2) The question whether claimant gave timely notice of his accident as required by K.S.A. 44-520 is the most troubling question to be answered concerning this preliminary hearing order. The Special Administrative Law Judge's Order does not make specific findings in regard to the timely notice question. However, at the completion of the testimony at the preliminary hearing, the Special Administrative Law Judge seems to find from his comments in the record that claimant did not give notice of accident within ten (10) days but that he did establish just cause for not giving notice within ten (10) days. Just cause is found by the Special Administrative Law Judge on the basis that the claimant made an attempt to give the respondent notice of his accident, but did so imperfectly or not properly. Thereafter, within seventy-five (75) days claimant did give notice of accident and, thus, met the requirement of K.S.A. 44-520. The respondent, however, argues that this claim is barred because claimant failed to give the required notice within ten (10) days and further, respondent had no notice of the accident until early October 1995 which is more than seventy-five (75) days allowed by statute to show just cause as to why notice was not given in ten (10) days.

The Appeals Board finds, for preliminary hearing purposes, that the claimant gave notice of accident to the respondent within ten (10) days as required by K.S.A. 44-520. The Appeals Board finds, taking the evidentiary record as a whole, that the evidence presented through claimant's testimony and the testimony of claimant's supervisor, Dave

Gantz, satisfies claimant's burden of proving that he notified Mr. Gantz that he had a work-related accidental injury within ten (10) days of the accident. Claimant testified that on Tuesday, May 30, 1995, following the Memorial Day weekend, he told Mr. Gantz he had hurt his back picking up a tarp at work on Friday, May 26, 1995. Dave Gantz testified that claimant had talked to him about his back being sore and he had observed claimant limping around at work. Mr. Gantz went on to testify that he had advised the claimant to go to the doctor and he knew the claimant had sought treatment with a chiropractor. Mr. Gantz testified that he assumed claimant had hurt himself at work even though he could not specifically recall the claimant telling him that his injuries were work related. The respondent argues that since claimant's supervisor, Dave Gantz, did not recall that claimant specifically described the accident to him that the respondent did not have notice of such accident.

The Appeals Board finds that Mr. Gantz knew as early as Tuesday, May 30, 1995, that claimant was injured and that his injuries were probably related to his employment with the respondent. Mr. Gantz testified that the respondent had not instructed him that the employee had to give notice to the respondent of the accident within ten (10) days. Mr. Gantz testified that claimant was an honest person and tried to work through his pain, but finally, as a result of this injury, could not and had to leave work. Mr. Gantz felt he was negligent in not demanding that claimant file a claim after he had knowledge that claimant had injured his back at work.

Accordingly, for preliminary hearing purposes, the Appeals Board affirms the preliminary hearing Order of Special Administrative Law Judge William F. Morrissey dated January 17, 1996.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order For Compensation of Special Administrative Law Judge William F. Morrissey dated January 17, 1996, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Topeka, KS  
Stephen A. McManus, Kansas City, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director

